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Book Review. Res Ipsa Loquitur, Presumptions and Burden of Proof by Mark Shain

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actualities of treatment, though it has produced the theories of juvenile procedure, probation and parole, and what limited educational opportunities for convicts are here and there in operation. The American Law Institute sought to put the idea into actual operation with its proposed Youth Correction Act whose stated purpose is "to protect society more effectively by substituting for retributive punishment methods of training and treatment directed toward the correction and rehabilitation of young persons found guilty of violation of law."

Researchers like Kretschmer and Hooton, without reverting to Lombrosian postulates completely, have discredited the prevention-through-fear-of-punishment hopes by their studies of the relation of physiology to crime. Ploscowe has expounded the extent of the belief that endocrine disturbance plays a large part in criminality. W. A. Bonger, on the other hand, insists that crime is a social rather than a biological product. None subscribes to the safety through fear doctrine. Healy and Bronner point out that "This new point of view endows the prison with the function of carrying out careful, individualized study, treatment and training of offenders, using the knowledge and techniques of medicine, psychiatry, psychology, education, vocational training and guidance, religious instruction, recreation, and every other discipline which contributes to the understanding and management of people."

That, in the reviewer's opinion, is the "modern" attitude toward the part of the criminal law which relates to the treatment of convicted offenders. Just what is the "modern" theory of proper content of the substantive law, he does not know, but suspects a rapidly spreading belief that the *fact* of anti-social conduct, hence of social dangerousness, should be emphasized, with lessened regard to the technical aspects of the conduct, as e.g., robbery or burglary. But this contrast of the new with the old, the force and prevalence of the changed philosophy, though adverted to in the compilation are not so emphasized as to justify the title.

The book may be useful as giving its readers an elementary, if superficial, understanding of what the criminal law is designed to do and how it operates. But even to that end the reviewer suspects that Messrs. Radzinowicz and Turner could have done a much better job had they written the whole book, specifically for that purpose, instead of merely correlating originally unrelated writings.

John B. Waite.

ANN ARBOR, MICHIGAN.

Res Ipsa Loquitur, Presumptions and Burden of Proof. By Mark Shain. Los Angeles: Parker & Co. 1945. Pp. xii, 486.

Here are four hundred and eighty-six pages of heavy discourse on the familiar doctrine of *res ipsa loquitur*, which Mr. Albert Levitt assures us in an introduction is "learned, keenly analytical and comprehensive" and Justice Carter characterizes as "a step along the

road of clearer thinking concerning the doctrine, an important goal in the administration of justice." It might be added that the volume is embellished with an invocation that "there be Justice," quotations from Samuel, "James" Greenleaf Whittier, Plautus, Terence, Alciatus and the author himself.

The announced thesis of the book is to demonstrate that the doctrine of *res ipsa loquitur* is a rule of substantive law which throws the burden of proof on the defendant to establish his innocence. The author quotes profusely from everybody who has ever written anything on the effect of presumptions, castigating mercilessly all those with whom he disagrees and extolling the masterful scholarship of those whose views coincide with his own.

Mr. Shain points out the several effects accorded by the various courts to *res ipsa loquitur*, (1) that the plaintiff merely avoids an adverse directed verdict, (2) that the defendant must "come forward with evidence of due care" to avoid such a ruling against him, (3) that the burden of proof is shifted to the defendant. In justice to the author's learning and keen analysis, it should be said that he cites a large number of cases, many of them accurately. He likes the third effect best. In fact he will have nothing to do with the first two. In ponderous and pontifical terms he seeks to demonstrate that the third rule is the "true rule", the other two the hideous offspring of ignorance, superficial analysis and even, in some instances, culpable neglect on the part of judges to find the truth.

The author simply has no patience for those poor misguided judges and scholars who have been taken in by the fallacious reasoning of Thayer and Wigmore. His denunciation is eloquent, sometimes magnificent. His pages are replete with such terms as "judicial folly"¹, "no symptoms of familiarity with the fundamental principle"², "ignorantly interpreted"³, "utter lack of care and consideration"⁴, "weasel-worded opinion"⁵, "ill-advised"⁶, "uninformed"⁷, "misconception of the substance and import"⁸, "artificial and ignorantly adjusted"⁹, etc. Perhaps the author's pet peeve is the hapless Justice Pitney who "had never heard of the English decisions" when he wrote the opinion in *Sweeney v. Erving*¹⁰ and ignorantly applied a different doctrine which he called "*res ipsa loquitur*".

Among the many culprits responsible for the confused deviations from the true rule should be named a series of half-baked law professors among whom the author includes Thayer, Wigmore, Balletine, Russell, Heim, Prosser and indeed this reviewer, all of whom

1. p. 63.

2. p. 182.

3. p. 182.

4. p. 198.

5. p. 199.

6. p. 202.

7. p. 217.

8. p. 221.

9. p. 228.

10. 228 U. S. 233, 33 Sup. Ct. 416, 57 L. Ed. 815 (1913).

are guilty of the unpardonable offense of paying some attention to Justice Pitney's "counterfeit rule".

In this volume one can find out, not only the "true rule" of *res ipsa loquitur* in the common law, but in "classical latin", in Roman Law, in Roman-Canonic Law, in French and Spanish Law, and in Latin-American Law. In fact, just about anything one wants to know about *res ipsa loquitur* is to be found here.

The author has made a religion of *res ipsa loquitur*, and the shift of burden of proof is his god. Woe to anyone who profanely doubts. Mr. Shain will have at him with all his terrible learning and keen analytical powers. And what he will do to him is plenty.

This review would hardly be adequate were it not to invite attention to the author's literary device "to clarify the doctrine and to facilitate its discussion". I quote:¹¹

- "1. *What* is the 'thing' which speaks?
- "2. *Where* does the 'thing' speak?
- "3. *When* does the 'thing' speak?
- "4. *Why* does the 'thing' speak?
- "5. *For whom* does the 'thing' speak?
- "6. *To whom* does the 'thing' speak?
- "7. *What* does the 'thing' say?"

As an illustration of the clarifying effect of this unique method of expository writing, the answer given to the second question is noteworthy¹²: "The 'thing' speaks at the trial of the case."

Fowler V. Harper.

BLOOMINGTON, IND.

General Theory of Law and State (20th Century Legal Philosophy Series: Vol. I.) By Hans Kelsen. Translated by Anders Wedberg. Cambridge: Harvard University Press. 1945. Pp. xxxiv, 516. \$6.00.

Need to defend the study of jurisprudence, we are told, belongs to a day that is past. If this is true, the wheel has come full turn. Mr. Jefferson, in a long letter to Dabney Terrell in 1821 concerning the education of lawyers, did not hesitate to assert that certain abstract related studies "are as necessary as law to form an accomplished lawyer." However, the tendency in the later years of the nineteenth century seems clearly to have been to think separately of theory and practice, and to emphasize the latter.

At present, the Association of American Law Schools, speaking through an Editorial Committee, assures us that "we have come to understand the superficiality of setting utility against theory." The Committee supports its dictum by contrasting with the present situation the situation in this country with respect to jurisprudence as it

11. p. 2.

12. p. 5.